Central Law Journal.

ST. LOUIS, MO., FEBRUARY 26, 1915.

SALE OF MACHINERY TO PURCHASER IN ANOTHER STATE THERE TO BE INSTALLED BY SELLER AS TRANSACTION IN INTERSTATE COMMERCE.

It seems to us that Texas Court of Civil Appeals greatly misconceives recent controlling decision in holding, that where a seller of a plant in one state to a purchaser in another state, with the seller, as part of his contract, to install the plant in the place where shipped, makes the transaction local, so as to exclude it, a foreign corporation, from access to the courts for not obtaining a permit to do business in a state. York Mfg. Co. v. Colley, 172 S. W. 206.

The court confesses to having entertained a different view upon this subject, and relies on Browning v. City of Waycross, 233 U. S. 16, 34 Sup. Ct. 578, as controlling its present view. We, however, regard that case as determining the exact reverse to what the Texas court holds.

The Browning case involved the question of a municipality requiring an agent of a foreign corporation selling lightning rods, the contract of sale including the affixing of the rods he sold to the houses of purchasers, to take out a license therefor. The Supreme Court held that he, the agent, was not protected by the commerce clause.

The court said: "We are of the opinion that the court below was right in holding that the business of erecting lightning rods, under the circumstances disclosed, was within the regulating powers of the state, and not the subject of interstate commerce, for the following reasons: (a) Because the affixing of lightning rods to houses was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of state authority. (b) Because, besides, such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated. It is true that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties, by the form of their contract, to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause. It is manifest that if the right here asserted were recognized, or the power to accomplish by contract what is here claimed were to be upheld, all lines of demarcation between national and state authority would become obliterated, since it would necessarily follow that every kind or form of material shipped from one state to the other, and intended to be used after delivery in the construction of buildings or in the making of improvements in any form, would or could be made interstate commerce."

Applying this reasoning to the case before the Texas court and it must be said that what the corporation's engineer was to do was "wholly separate from interstate commerce," and Texas could, as the city of Waycross did as to the lightning rod agent, regulate the business of the corporation's engineer—regulate his business of installing machinery or of a plant shipped in interstate commerce.

The principle announced in the Browning case is a very salutary one, and its effect is merely to limit a technical rule good between the parties but having its limitations, so far as the public interest is concerned. This interest says, in effect, that what a contract provides for to make a complete delivery and to be done after interstate commerce has protected a shipment to the extent it was intended to protect it, shall not be free from local regulation, it being only by force of the contract that the afterthing is provided for. In such event, whoever engages to perform the afterthing submits this afterpart to the same regulation as though it were

to be performed by the other party to the contract.

This regulation takes away no right of either party. If it is to be performed by the non-resident he should add the charges of local regulation to his sale price, just as supposably the seller in this case added the salary of its engineer as one of the overhead charges in its business.

NOTES OF IMPORTANT DECISIONS

COURTS—STATE STATUTE GOVERNING REMEDY IN FEDERAL COURT IN COLLECTION OF TAXES.—There was certified to the United States Supreme Court by Eighth Circuit Court of Appeals the question whether a Federal District Court has jurisdiction to appoint its own officer to apportion and collect a tax to satisfy a judgment on county bonds. Yost v. Dallas County, 35 Sup. Ct. 235.

This case shows a judgment on the law side of a district court against a county of Missouri and repeated efforts by mandamus to compel its officers to collect taxes for its payment. Finally plaintiff brought suit in equity for the court to appoint its own officer to make the apportionment and collect sufficient taxes out of the inhabitants and property therein to pay such judgment. The district court granting the prayer for relief, the Circuit Court of Appeals certified the above questions.

Mr. Justice Holmes, speaking for seven of the nine members, two dissenting, said: "The fundamental consideration for answering these questions is that the obligation upon which the judgment was recovered, was an obligation under, not paramount to, the authority of the state. * * * The plaintiff by bringing suit in the United States Court, acquired no greater rights than were given to him by the local statutes. The right so given was to have a tax levied and collected, it is true, but a tax ordained by and depending on the sovereignty of the state, and therefore limited in whatever way the state saw fit to limit it when, so to speak, it contracted to give the remedy. It is established that 'taxes of the nature now in question can only be levied and collected in the manner provided' by the statute, and therefore that it is impossible for the courts to substitute their own appointee in place of the one contemplated by the act."

This is the construction the Supreme Court puts upon the Missouri act and the opinion ends with saying: "Until the Supreme Court of Missouri says otherwise, we should read them (its provisions) in that sense."

There is here a very distinct recognition of the right of a state court to give exclusive construction to state law, and also there is impressed the fact that mere jurisdiction by a federal court to render a judgment does not free it from restrictions imposed by state law as to its collection. This is true as to exemptions allowed by state law and why should it not generally be true? In such a case as that before the court to refuse to enforce state law as to levy of taxes would seem to raise a discrimination, unconstitutional in its nature between residents and non-residents, when jurisdiction has not attached by reason of subject matter but only by reason of the capacity of parties.

INSANE—PAROLE BY SUPERINTENDENT OF ASYLUM AS COMING WITHIN THE RIGHT TO DISCHARGE.—There seems to us to run through courts something of a claim to authority to parole prisoners under sentence and Washington Supreme Court appears possessed of this idea in a late case, where the superintendent of an insane asylum having the right to discharge an inmate, was sued for injury done plaintiff by an insane while out on parole. Emery v. Littlejohn, 145 Pac. 423.

The statute provides that "any patient may be discharged from the hospital, when in the judgment of the superintendent, it may be expedient." Naturally one would think, that as the asylum is resorted to after statutory inquiry upon the question of one being committed there. there he should remain, until the reason for his being committed should cease to exist. This conclusion seems enforced in view of there being a provision elsewhere on the same subject for the issuance of a parole by a court upon evidence being submitted and the relatives or friends of the inmate giving bond or showing the court that they can take care of him and respond for any of his acts as an insane person.

The court argues that the right to grant a full discharge includes the right to grant a conditional discharge or a parole, and the discretion the superintendent exercises in either grant frees him from all liability for the acts of a discharged inmate. There is little doubt that discretion in the performance of duty has the effect stated. But what we object to is the reasoning that the right to grant an absolute discharge includes as a lesser thing the right to grant a parole.

It is not for a superintendent to substitute his judgment for that of a court committing an insane that it is dangerous for him to be

at large, until he has found that the malady or defect that caused his commitment has wholly disappeared.

In this case he decided ex parte that, though the inmate was not entitled to be discharged, there was no need for proof to be made of fitness to care for him or bond to be given to respond for injury for acts committed by him. The superintendent was only made the judge of one thing and that was whether the inmate by reason of change in condition should be finally discharged. When he transcended his power his discretion did not pass to the performance of his act.

GOOD CHARACTER—PRESUMPTION IN THE ABSENCE OF ATTACK IN A CRIMINAL CASE.—In two cases coming up from Oklahoma District Court to Eighth Circuit Court of Appeals, instructions were asked on the question of good character, where there was nothing in evidence on this subject and refused. One of these cases was affirmed and the other reversed on other grounds, one judge writing the opinion in the latter case expressing the opinion that the instruction should have been given, and the other two being 'unable to assent to the statement that such a presumption (of good character) exists in a criminal case." Price v. U. S., 218 Fed. 149; Chambliss v. U. S., 218 Fed. 154.

The instructions were in effect the same in each case, and we quote from the latter case: "You are instructed that the law presumes the good character of the accused, and such presumption is to be considered as evidence in favor of the accused in considering the question of his guilt or innocence."

Judge Amidon, speaking in the former case, said: "In a criminal case, when no evidence is offered in regard to defendant's character, there is no presumption that his character is good, and certainly such presumption, if it were to be indulged, would not be evidence. * * * To say that defendant's character shall not be attacked, unless he himself puts it in issue, is manifestly a very different thing from saying that his character is presumed to be good."

The judge then refers to a large number of state cases cited by counsel for accused. But he distinguishes them as turning upon the question of permitting an attack on character where it was not put in issue and says that whatever appears in the opinions was by way of illustration or emphasis and was no part of the judgment.

In the other case there is much discussion and Coffin v. U. S., 156 U. S. 432, is relied on as sustaining the request. There is much reasoning by both of the judges and the citation of much authority in cases and text books and upon the whole it would seem that it is very doubtful whether the instruction should have been given or not. It may be that the state having no right of appeal has kept the question from being greatly considered by appelate courts. This also implies that when defendants have asked such an instruction it has been given.

THE ELEMENTS OF SUPERSTITION IN PLEADING AND THEIR ELIMINATION.

There are two extremes of procedure in getting disputes settled. One is, for the parties, with all of their witnesses, friends and relatives, to come together before a third party, all to talk at the same time, putting questions, answering them, arguing, accusing each other, etc., without any order or decency, until they make the arbitrator absolutely dizzy, and he knows no other way out of it than "Judgment for Plaintiff." Whosoever has ever had the pleasure of trying to have a dispute among Italians settled in a justice's court, will remember this kind of procedure, and he will agree that it is not to be recommended.

Then there is the other extreme. Not only is order and decency here enforced "one at the time," but fixed forms, containing certain indispensable words, must be used. Without them, the cause may be perfectly understood, its justice or injustice may be as clear as day, but this is of no avail, as long as ipsissima verba have not been used and, moreover, used in a certain order and sequence. You have not said that which you ought to have said, and you have said that which you ought not to have said, and there is no law in you. Most of us have had experience with this extreme, and it may be ruling even now in certain places. It is not so very long since that, in Pennsylvania, it was not sufficient for defendant, in his affadavit of defense, to show a good

defense, he must also specifically aver "all of which defendant expects to be able to prove at the trial of the cause." If this entirely formal statement was not in your answer, you might expect a rule to be entered on you for judgment for want of a sufficient affidavit of defense, and to have the rule made absolute.

When you see and meet such widely different methods of handling disputes, you cannot help asking yourself: What is the object of rules of procedure?

One answer is: That justice may be done. But that is too general to be of any use. Justice done is the ultimate goal, not only of rules of procedure, but of the whole body of law, and of substantive law in particular. If the substantive law does not deal out justice, no rules of procedure can remedy it.

Another answer is: Audiatur et altera pars. This is true, but too narrow. In the first mentioned form of procedure, altera pars made himself heard, but that did not save him from having snap judgment entered against him.

Still another answer is: The object of rules of procedure is, to put the judge in such a position as to enable him, fully to understand the case and to decide it in accordance with the equities thereof and the law of the land.

But then the question arises: What rules will do that? And the further question: Must such rules be made mandatory, or is it sufficient to make them discretionary? Before we go further, it may be well to point out that, under this theory, the greatest trouble caused by rules of procedure is that rights for the parties grow up under them. They were intended as guides for the courts, but the conclusion is almost necessary that, if it is the duty of the court to follow certain rules, then the parties must have the right to demand that the court does follow them. If, therefore, the court in a certain case has decided that, according to its rules, a certain specific procedure must be followed, it at once becomes the right of one of the parties in another suit to have the same procedure followed there. But the object of rules of procedure cannot be confined simply with the view of enlightening the judge. Rules so confined would be the best, if judges were angels, in wisdom and in probity.

Rules must be so framed as to give the parties a chance to present their case; but they must also be of such a nature as to become a curb on the arbitrariness of judges. It is the latter requirement that has made and does make rules of practice so techincal.

It was natural to primitive man, when he had the power, to do to his neighbor as he pleased. The resultant interminable fights and anarchy led to the first organization. But the desire for power and its arbitrary exercise survived; the difference created was that, while before organization everybody exercised his power according to his own desire, now such exercise was confined to the powers that be. The tyranny was not diminished, but the number of the tyrants had decreased. For those suffering from this arbitrary exercise of power by tyrants, it became the most vital question, how to check and curb it. They could not do it by force: They did not have the power; they could not do it by argument or persuasion: their lords did not care the least whether their conduct was defensible from a moral standpoint (even if they had any conception of such) as long as they were strong enough to keep active opposition down. For these reasons, they had recourse to fear. Fear of what? Their lords did not fear their subjects; they were strong enough to defy any man or body of men for many miles around. But they did fear their fetishes. hoodoos and gods.

All judicial power of decision was originally in the hands of the priests, who called upon the worldly powers to recog-

nize and carry out their decisions, under threat of the vengeance of a power which even the tyrant acknowledged to be superior to his.

The strength of this power lay in this, that he was unknown; the exact extent of his power was unknown; his real disposition was unknown. But the priest said that he was terrible, and he proved it by pointing to the floods, earthquakes, tornadoes, plagues, etc., etc., that he was constantly visiting on mankind, when they had provoked his wrath. The priest told the tyrant that this supernatural power's commands as to the relations among men must be carried out, or dire results would overtake him who set himself up against them. And the same he told the subjects.

But how were the desires and commands of this terrible power to be ascertained? The ordinary man never saw him, never had converse with him; the utmost he could do was to kill something to his glory, and offer up the carcass as a sacrifice.

The priests, however, did meet him in the sanctuary. By means of visions, dreams, omens, oracles, etc., they learned from him, what men should do and not do. And what they learned, they preached to the lord and his retainers.

But it was of no use for anybody, simply to ask this power what his desires were. He was too distant to hear them, and even if he did hear the questions, he was altogether too great and too important to pay any attention to such simple proceedings. No, if you wished this power to hear and deign to answer, you must first venerate him. You must prostrate yourself before his presence; you must address him by all the biggest names your vocabulary contained, or that you could invent; you must offer him the best of your substance, you must even spill blood in his honor. In other words, you must consider, approach and treat him as a super-tyrant, possessing in a superlative degree all of the same self-sufficiency, vanity, covetousness and cruelty, as the petty tyrant under whose sway you happened to be; like him this distant, terrible power could be brought around to your point of view, if you ministered sufficiently to his haughtiness, vanity, rapacity and lust for blood.

But, in doing this, you had to go about it decently. As in your relations with your earthly tyrant, you could not simply walk up to his judgment seat, tell him you had a case on with Samuel, and then hand him a goat, and say that you now expected the case to be decided in your favor, but had to work up to this climax through a long succession of steps, showing your anxiety, your humility, your deep appreciation of the lord's superiority, your acknowledgment of the reasonableness of his view, that there should be something in it for him, finally your readiness to kill, even your own child, if your tyrant's cruelty, vengefulness or spite should demand it. So before the supernatural, unknown power, you had to do all of the same things, only more emphatically. You first had to wake him with a dance, or a song of supplication, and then go through with all of the proceedings in a fixed order. Suppose you offered your sacrifice, before you had sufficiently humiliated yourself, was it not to be expected, that this power would say: Who is this fellow who comes in here and treats me like his equal? Who thinks that I am dependent on his goat for my meals? Who has the presumption to think that he can purchase me, as if I were a slave? Throw him out, give him a hundred stripes, drown him in the lake, and then send him to the everlasting fires.

One day a priest arose having the real ceremonious, ritualistic bend. He produced the very best formula for approaching the awful unseen power. He found the very best expressions of adora-

tion and veneration, of humiliation, of sacrifice and of obedience; he put them in the best order of sequence, and he connected them up with each other in the most admirable way. Hence the unseen power would hear no complaint or petition, unless presented in words and deeds at least as fine and appropriate as these, and as nobody could improve on the priest's work, the ritual had become established. The desire to outdo each other is strong, however, in men's minds; the priest's successors could not improve on his work, but they could cover it all over with embroideries, and for every day that passed, the ritual became more and more a conglomeration of words and ceremonial acts, the original meaning and purpose of which gradually were forgotten and lost, but became proportionally daily more necessary and imperative, because now they had become mystical, and must of necessity express and correspond to something equally mystic in the awful power. There was another thing the epigons could do: they could differentiate. If you applied to the power for help in the sickness of your child, you used one ritual; if it was a question of having pointed out the man who stole your cow, you used, in the main, the same ritual, but with certain modifications, so as to fit the details of the circumstances a little better, and so on and so on, until there ended by being a special "writ" for every imaginable case in which you might need assistance from the awful power.

In all priesthoods, there are two forces at work. The force that is mainly concerned with the spreading of the kingdom of their gods; and the force that works for the maintenance and strengthening of the kingdom of the priest. Through the efforts of the latter, law became gradually distinguished from, and eventually separated from religion, but in the separation, law carried with it the whole ceremonial ritual, under and by which it had hitherto been practiced. There remained in the mind of man a rooted conviction that law was something dependent on grace; that whosoever exercised the law might do it righteously or unrighteously, as it suited him.

When you want something from your neighbor by the assistance of the court, you must bring him before the court. But can you do so yourself? Yes, and no. In many countries the law gives to your private summons the effect that defendant must respond or take the consequences. But in other countries that cannot be done. You have to go to the court's clerk, give him notice that you desire to bring such an action and get him to summon the defendant; the court must have warning, lest it should be caught napping. Even the clerk you have to warn; you must first hand him a precipe for a summons.

In due time, you address the court, and naturally commence by prostrating yourself. Not before the court, however, it is impersonal. But before the judge occupying the judgment seat. He is personal. You address, not the Honorable court, but the Honorable the Judge of the said court. Having recited your tale, you do not request judgment according to law, you pray that judgment be entered for you. Whereupon, you further pray for long life, health and prosperity of the judge, and insist that you will ever so pray.

Now, all this is immaterial in itself. But it creates a certain atmosphere, the atmosphere of grace, instead of that of right, and this atmosphere persists all through the case. The supposition still is that the judge really can do as he pleases, but the fear of his hoodoo (public opinion, fear of losing his good name, etc.) will restrain him, if you can convince him that he had better side with you, or his hoodoo will get him.

We suppose that if there was nobody else to consider but the lawyers them-

selves, both those on and off the bench, the "awfulness" of the court would soon disappear, and business before a judge would be done very much in the same way as before other men in the ordinary walks of life. And this supposition is strengthened by looking to such courts where the procedure is entirely in writing, where practically nobody else is present but judge and lawyers. They are all busy men; they know the "inside" of the business; they become impatient of all unnecessary ceremonials, rituals, fixed forms and words, and gradually they eliminate all surplusage. The practice in the courts of many countries, and in our own equity courts, shows this. But where the oral form of procedure prevails, where each such case becomes a drama played before such audiences as do attend, the tendency naturally is toward grandiloquence. But grandiloquence will not thrive, except with a certain amount of setting.

There must be a stage of sufficient magnificence so as to make things look fit. There must be created an atmosphere of solemnity, for which reason judges must appear in gowns or uniforms, and in many places the pleaders likewise must be dressed up and wear a wig or a cap. There must be a number of minions around to jump at the beck and call of judge and counsel. There must be certain ceremonies of opening and closing. There must be a strict ritual, according to which all proceedings must be carried on. By preference, this and the underlying reasons must be incomprehensible to the audience. There must be provided all possible chances for dramatic incidents, objections with ensuing arguments, exceptions, interlocutory rulings, stern rebukes from the bench; if convenient, imposition of fines for contempt, etc., etc., by all of which the tension is increased and the dramatic interest maintained, until upon the last lap before reaching the climax, come the impassioned speeches about Jones' fence or Mrs. Black's cat. Then the judge, in a highly authoritative tone of voice, and with the greatest solemnity, must instruct the jury, that they are the sole judges of the evidence and that, if they believe the witnesses for the plaintiff, they must find for him, but if they have more faith in the witnesses for defendant, they must find for him—and the jury files out to perform its solemn duty. The drama has now reached its climax, the tension is extreme, the sporting instinct of the audience is aroused, and among themselves they indulge in heated arguments and lay bets on the verdict. But, like all dramas, this also has to come to an end, and after the jury has returned, and some more ritual has been gone through with, the jury renders its solemn verdict for plaintiff in the sum of eighty-three dollars and seventeen cents. The drama has come to an end, and, there being still half an hour left to lunch-time, the audience moves into the nearest movie.

Is all this necessary? Yes, and no. If it is necessary, in order to have cases decided right, that there should be a place provided where those having nothing else to do, can cool themselves off in summer, and obtain a warm room in winter, if it is necessary to have these people present, then the ritual must be kept up. The average man is a mystic and delights in nothing so much as in show, rituals and ceremonies. The fact that no sick benefit association has been known to survive, at least among English-speaking people, unless it had first provided itself with an odd, mystic, solemn or grandiloquent name, established a solemn ceremonial for admission thereto, a grand ritual for the conduct of its business, and such names and titles for its officers as not even the Emperor of Rome ever thought of approaching in grandeur—these facts show that in order to interest the average man, in

order to convince him, to make him trust and believe, you must still have a shadow picture of the hoodoo floating in the background, with the possibility suggested that at any moment he may swoop down upon such who do not behave themselves.

Now, the question is: Is it of interest to the exercise of justice that the attendance and participation of the general public, in the form of audiences, should be catered to? If it is, then the whole setting and procedure in forma dramatis must be retained. And, if they are retained, then the technicalities, ceremonies and rituals must also be retained, or else the general public will not attend, and the proceedings must even be made more dramatic, and more stage-craft must be exercised. Probably, there are always a few spectators, not directly interested, at all trials; but, as we stated, these are people having nothing else to do, the same class you find reading illustrated journals and magazines in public libraries. If their attendance is of no benefit to the exercise of justice, no staging for their benefit is required. But there are cases where the largest room in any courthouse becomes filled to suffocation by the public anxious to hear and see. What kind of cases are these? The answer is: Murder and divorce cases. In other words, in such cases, the court rooms are filled with such people, in whom the atavistic instincts of cruelty and lewdness survive strong. Does it serve the end of justice that these people's instincts should be gratified, at the expense and to the further humiliation of some wreck of humanity? If not, why then keep up all this theatrical business? When we come down to brass tacks, is it not a fact that, under the guise of serving a legitimate public interest, the whole of the staging of judicial proceedings is arranged for the benefit of the actors? How is a judge to be re-elected, unless he can keep himself before the public eye? How is the practitioner to be known to the general public, unless he is given an opportunity for grandstand-plays, with subsequent mention in the newspapers?

In other words, so long as the profession is willing and anxious that judicial proceedings shall be a game, where tricks, fine plays, stealing of bases and spit-balls win, the technicalities cannot be eliminated. Not until the public has been convinced, and the profession has been compelled to agree, that judicial proceedings ought not to be a game, but is business, not until then can they be conducted in a business-like way.

Now, suppose we agree that it does not make for the best interests of justice that the audiences now attending should be induced to continue to do so, nor that an opportunity should be given the judges and practitioners to advertise themselves, what can be done to eliminate the ritualism and technicalities following in the wake of judicial proceedings as now organized?

The "game" character must be taken out of them. How can that be done? By improving the pleadings. Every case, when it comes on to trial, should have been so illuminated from both sides, that there can be no doubt about the claim of both or of either parties; that it is known exactly what is in dispute, which facts have to be proved by plaintiff and which by defendant. To reach this result, it will be necessary to abolish the rule that the evidence shall not be set forth in the pleadings; on the contrary, it must be made the duty of the parties to disclose it. The object of the trial is not, that A should win, or that B should win, but to have the case decided upon the statements of the parties and their proofs thereof; with this object in view, the rules should be framed so as to guard against surprises caused by equivocal pleadings.

The wholly written procedure of ecclesiastic and of some civil courts is very unsatisfactory in many ways, especially in the result that, while the proceedings are public in principle, they become private in fact. But it has the distinct advantage of defining the issue very clearly before any proof is undertaken; it does away with all surprises; it drives the gaming features out of the case. Without making the actual trial a series of depositions, and the arguments a more or less interminable succession of briefs, we might take a leaf out of the book of the ecclesiastic courts as far as pleadings are concerned.

Of what use are our present pleadings? They are very useful in generating all sorts of preliminary proceedings quoad formalia: demurrers, motions, rules, etc. But do they really help to elucidate the case? The plaintiff in his statement must, to some extent, set forth his case, but what has defendant got to do? If he follows plaintiff's statement, and, paragraph after paragraph, denies the truth of the allegations therein, he has made a good defense. In other words, "You are a liar" is a good defense, and upon such a defense, plaintiff must go to trial, and the court take up the case. The pleadings seem to be devised for the purpose of preventing the case from being fully elucidated and to leave as much leeway as possible for stretching the issue as the case proceeds. Read them, after they are all in, and you will find that from them you cannot find out what are the real points in dispute; they are not intended to set forth the case; if they did so, we would read them to the jury at the trial. Instead thereof we make an oral statement. If it was not for the fact that it would be impracticable to make the defendant answer on the spot, and to have his proof ready, they might as well be left out. As it is, they are like the standing exercises by means of which we limber up for our real athletic practices.

From the standpoint of practical jurisprudence, one might almost feel inclined to regret that the Year Books have survived. In them we see one of the struggles going on through which a people, essentially barbarian, endeavors to raise itself from the barbarous condition of a superstitious trust in symbols, to that conception and mastery of form which is the condition sine qua non of culture. But we also see that, while the old English lawyers struggled bravely to attain this goal, they never reached form, but had to be satisfied with formulas, and these, by their very nature, were bound to multiply in infinitum, until there almost came to be a separate writ for every imaginable contingency. The English lawyers attained to a really wonderful mastery of all these formulas, but that mastery of the subject matter which in itself would lead to the form, they did not commence to attain until centuries after the year books. Even to this day, the object is not to make a statement of the facts, but to select a legal formula, and then to state just enough of the facts to justify the selection of this particular formula * * * and from this follow all of the interminable preliminary proceedings, almost all of them of no importance whatever for the decision of the matter in dispute.

Quod non in actis, non in mundo, is a principle that can be stretched into the absurd, but in so far as it requires that the case of each party must be fully stated before he goes to trial, it is a sound principle. So long as we keep "the evidence" out of the pleadings, we shall never succeed, to any great extent, in eliminating useless technicalities and the delays they cause, from our practice. Of course, if we put "the evidence" in our pleadings, they will increase in bulk, and it may lead to replications and duplications in most cases. But then, we shall have fif-

ty pages of testimony where we now have three hundred, because the majority of the questions now put to witnesses will be unnecessary, and the number of facts about which testimony must be taken will largely decrease. We confidently contend, that if pleadings were required to tell each party's story, not only would the issue appear much more clearly and definitely, but the bulk of the whole case would materially shrink.

And, if one of the objects of rules of procedure is to curb arbitrariness upon the part of the judges, then no better means can probably be devised than that of commencing the case by making a full, clear and explicit record of what the dispute is about; that cannot be gotten away from afterwards.

There is a certain charm about what has survived for a long time; you hate to see an old landmark go, but when it becomes a hindrance and a nuisance, it must go; if it is not in the way, it remains and is kept up and in repair. Some rules of practice everywhere are direct descendants of such as were invented in honor of the hoodoo, or for the radical purpose of keeping the fear of the hoodoo ever present in the mind of the tyrant; such do very little harm, there is something quaint about them, they appeal to you in the same way as an old family heirloom. Others are nothing but embroideries, scholastic rules, laid down as foundations for dialectic fireworks. These do harm; in them the "game" is hidden, they lead both bench and bar astray into "playing" the "game," instead of trying the case. These ought to go. The "game" feature will never entirely disappear from cases, until all men are angels, when there will be no cases. But instead of having rules of practice inviting to gaming, we might have rules discouraging it.

AXEL TEISEN.

Philadelphia, Pa.

PARTNERSHIP—NOTICE OF DISSOLUTION.

WOOD v. J. W. JEFFERIES & CO.

Supreme Court of Appeals of Virginia. January 12, 1915.

83 S. E. 1074.

A publication in a newspaper of a notice of dissolution of a firm by the withdrawal of a partner and of the continuance of the business at the same place and under the same name is not in itself notice to a previous customer of the firm, and where he has no actual notice the retiring partner is liable on a note subsequently executed by the new firm.

WHITTLE, J. This is a writ of error to a judgment in behalf of the defendant in error against the plaintiff in error for $600, with interest and protest fees, on five negotiable notes, aggregating the above amount, made by the Manchester Wood & Coal Company, by R. G. Wood, Jr., to the plaintiff.

The origin of the transaction out of which the litigation arose is this: Prior to April 1, 1911, Mary H. Wood and R. G. Wood, Jr., were partners under the firm name of the Manchester Wood & Coal Company, located and doing business in South Richmond. Amongst its customers was the plaintiff, trading as J. W. Jefferies & Co., of the city of Richmond. On April 1, 1911, M. H. Wood and R. G. Wood, Jr., published notice, by two successive weekly insertions in the News-Leader, a daily newspaper in the city of Richmond, of the dissolution of the firm of the Manchester Wood & Coal Company by the retirement of M. H. Wood. The notice, moreover, announced that the business would be conducted at the same place and under the same name, with R. G. Wood and R. G. Wood, Jr., as partners. The notes upon which the judgment under review was rendered, though made after publication of the notice of dissolution, were renewal notes given by R. G. Wood, Jr., in lieu of notes for similar amounts made by the old firm before dissolution. The proceeding was by motion and the notice was only served on M. H. Wood. The plaintiff had been a customer of the old firm, and the vital point in the case was whether or not he had actual notice or knowledge of the dissolution of the firm prior to the making and delivery of the renewal notes.

(1) With respect to notice of the voluntary dissolution of a general partnership, a distinction is drawn between those who have previously dealt with the firm and those who have had no such dealings.

As was said by this court in Dickinson v. Dickinson & Co., 25 Grat. 321, at page 329:

"As to the former, it has been universally held that actual notice is indispensable. It must not be inferred, however, that special notice must be given to each customer. If actual knowledge of the dissolution is brought home to the party, he will be concluded, although no notice whatever may have been given."

(2) The doctrine is thus stated by Professor John B. Minor:

"A partnership is not ended, in respect to strangers, merely by an agreement between the several partners to dissolve it. From existing debts and liabilities of the firm to third persons, the retiring partner is, of course, in no case exonerated by the dissolution; and even as to such as are contracted afterwards, he is responsible in cases of voluntary dissolution, unless he gives notice of the fact to the public by general advertisement in the newspapers or otherwise, and to the previous customers of the firm by special communication, as by circular or other similar mode. Smith's Merc. Law, 33; Sto. Part. §§ 159, 334; Parker v. Carruthers, 3 Esp. 249; Dickinson v. Dickinson, 25 Grat. 321." 3 Min. Inst. pt. II (2d Ed.) p. 888.

(3) The publication in this instance in the News-Leader was not in itself notice to the plaintiff of the dissolution. And the only direct evidence on the subject was the testimony of the plaintiff, J. W. Jefferies, who said that he had no actual notice.

(4) In this state of the record, it is not necessary to notice the assignments of error in relation to the giving and refusal of instructions, since the jury could not, even under proper instructions, have rightly found a different verdict. Burks' Pl. & Pr. § 267, p. 503; Winfree v. Bank, 97 Va. 83, 33 S. E. 375; Southern Ry. Co. v. Oliver, 102 Va. 710, 47 S. E. 862; Moore v. B. & O. R. Co., 103 Va. 189, 48 S. E. 887; Schwalm v. Beardsley, 106 Va. 407, 56 S. E. 135.

For the reasons stated the judgment should be affirmed.

Affirmed.

NOTE.—*Publication of Notice of Dissolution Not of Itself Effective Against Former Dealers with Partnership.*—The statement that the publication made in the instant case was not in itself notice of the dissolution seems well borne out in decision. Thus it was said in a West Virginia case that: "One class of persons has become acquainted with the firm, and, by presumption of law, with its membership, so far at least as this is not dormant. These are entitled to the same certainty of notice of dissolution as they had of its existence, which is actual knowledge. The rest of the world, i. e., that part of it which has not given credit because acquainted with the fact of its existence from reputation, hearsay or their own observation. And this is to be counteracted by a publicity of the same sort, and at least measurably as widely spread, viz., proper publication in the proper newspaper. It is true the latter class may be as much misled by want of actual knowledge of dissolution as the dealer class, yet the partners cannot know who such persons are, and if more than constructive notice were required, a partner would in the often quoted language of Lord Kenyon in Abel v. Sutton, Esp. 108, 'never know when he was to be at peace and freed from all concerns of partnership.'" Werner v. Calhoun, 55 W. Va. 246, 251, 46 S. E. 1024.

But the form of notice is immaterial. There must be "actual notice or knowledge of the facts sufficient to put" the former dealer upon inquiry. Smith & Cheney Co. v. Schmidt, 142 Mich. 1, 105 N. W. 39. This case, however, rules quite strictly as to what constitutes a former dealer. Thus while the plaintiff accepted what was the first order for goods given by defendants before dissolution, yet if the terms were changed in any way after dissolution, the retiring partner would not be held. For this there was cited Goodspeed v. Wizard Plow Co., 45 Mich. 322. This case showed, however, that two days before goods were shipped there was actual notice given of dissolution, and there was no acceptance of the contract of sale prior to this time.

In Simmons Hdw. Co. v. Peck, 176 Mo. App. 86, 162 S. W. 1061, it was said: "If the plaintiffs had dealt with the company (creditor) before the retirement of any of its members, it was necessary that notice should have been given to the plaintiffs of their retirement and this notice should have been actual and brought home to them, or, at least, the credit must have been given under circumstances from which actual notice may have been inferred. Notice in a newspaper, though published in a fair and usual way, will not of itself, be sufficient as to those having former dealings with the company." There are cited a number of Missouri cases to this effect.

And it is no defense that they (the partners) were in fact unknown to the creditor, as the proof showed in a Massachusetts case. Victor v. Spalding, 202 Mass. 234, 88 N. E. 846.

In Eighth Circuit Court of Appeals, Thayer, C. J., said: "The usual practice among merchants is to mail written or printed notices to those with whom the firm has previously had dealings when any changes occur in the personnel of the firm, and those who have dealt with it may reasonably expect such a notice or a notice in some other form which is equally authentic." Neal v. Smith & Co., 116 Fed. 20, 54 C. C. A. 226. In this case the proof that Martin and Neal did business under the firm name of Charter Oak Mercantile Company and after the dissolution by sale to one Cushman, the latter was introduced to plaintiffs' manager by a traveling agent, as "Mr. Cushman, the whole cheese of the Charter Oak Mercantile Company." This statement was not regarded as "proper or sufficient notice of the dissolution of the firm. The traveling agent was of the Charter Oak M. Co. Judge Thayer principally decides this case upon the fact that it was no part of the duty of the traveling agent to give such notice, as it was "so easy for one who has retired from a firm to rid himself from liability for future debts by mailing a notice of his withdrawal to those with whom the firm has been in the habit of dealing."

In Nevens v. Bulger, 93 Me. 502, 45 Atl. 503, there was offered in evidence a published notice of the dissolution so as to affect prior dealers with a partnership without any proof to show actual notice or knowledge and it was held rightly excluded.

A New York case as to creditor dealing with the old firm, said: "It was necessary for the defendant to show that the plaintiff had actual knowledge or was chargeable with knowledge of two important facts, namely, the misuse by the other partner of the firm name before or after the dissolution and the actual or formal dissolution by the partners as between themselves. The formal act of dissolution had no effect on plaintiff until it was chargeable with knowledge of the fact."

It seems unnecessary to quote further from cases, as the law seems quite universal, that there must be actual knowledge of dissolution or what is equivalent thereto so far as former dealers are concerned, and published notice suffices only for those dealing with the firm afterwards, though there is no change in the firm name. C.

ITEMS OF PROFESSIONAL INTEREST.

CHIEF JUSTICE WALTER CLARK, OF NORTH CAROLINA—A JUDICIAL MODERNIST.

Ever since we wrote the article which we entitled "A Radical on the Supreme Bench," which appeared in 79 Cent. L. J. 441, many inquiries have come to our table for more information concerning the subject of that article, Hon. Walter Clark, Chief Justice of the Supreme Court of North Carolina. Hence the portrait of Judge Clark on the front cover page in this issue, and hence this sketch.

He was born August 19, 1846; is a native of North Carolina, and a graduate of its State University. He served in the late civil war, holding the distinction of being the youngest officer of his rank (lieutenant-colonel) in the Confederate army. He was admitted to practice in 1868, was elected to the office of Judge of the Superior Court in 1885, and to the office of Justice of the Supreme Court in 1889, where he has served the people of his state ever since, being made Chief Justice of the court in 1903.

No one questions Judge Clark's scholarship. While extremely radical in his views, his arguments, always well constructed and embellished, are literary imagery of unusual grace and beauty. And while we cannot bring ourselves into agreement with all his views, we are quite interested in the personality of the man and marvel at the wonderful abandon with which he tears down the sacred idols of an ancient profession.

Judge Clark has written probably as many dissenting opinions, which afterward became the law as any judge that ever lived. In this respect he runs a close race with Hon. Thomas A. Sherwood, a justice of the Supreme Court of Missouri for thirty years, now living at Long Beach, California.

Judge Clark's dissenting opinions are, as a rule, vigorous, though somewhat extreme, protests against tying up the law of to-day too hard and fast to the law of a hundred years ago. His position is well illustrated by a dissenting opinion filed in the case of Gill v. The Commissioners, 160 N. C. 176. In this case the majority of the court held that a statute which gave "freeholders" the right to sign certain school tax petitions, did not include "women," since at the early common law only a "freeman" could hold a freehold estate, and the feudal duties attaching to such a holding were not performed by women. Here, indeed, was a situation and an argument against which the spirit of this extreme "modernist" among judges rebelled most bitterly.

In a very learned and exhaustive dissenting opinion Judge Clark tears the argument of the majority into pieces. We do not know where we have ever read a more searching analysis of the weakness of analogies based on ancient common law decisions, especially when applied to modern conditions or modern statutes. His argument contained the idea that when a legislature of present day business men use such a term as the word, "freeholders," they do not have in mind what he calls the barbaric conditions of an ancient feudalism, out of which the word was originally evolved; but had in mind only the fact that any one who owned property for life or in fee is known to-day as a "freeholder," whether male or female. The closing paragraph of this dissenting opinion affords such a striking illustration of Judge Clark's manner and style of opinion writing that we quote it in full. He said:

"We can derive no aid by reference to the status of women under the feudal system, which was long ago rejected by the common sense and sense of justice of our race and the remnants of which were abolished as long ago as 12 Charles, II., (1660), over two centuries and a half ago. Nor is there any help to be had from decisions concerning the meaning of the word 'freeholder' as one of the qualifications for voting and holding office, which are restricted by the Constitution to 'male persons.' We are here dealing with a statute to provide safeguards in voting taxation, and the ownership of property, unlike suffrage is not restricted to one sex. It is not the province of the courts to seek out strained analogies, or to delve in the *debris* of a rejected and barbarous legal sys-

tem to defeat and destroy an act which the legislature has adopted in accord with the spirit of an advancing civilization. It is not for us to bivouac always by the abandoned camp fires of more progressive communities. The courts should construe legislation from the standpoint of the age and the men who enact it."

It is interesting to note that as we go to press we receive the information that the Legislature of North Carolina, now in session, on February 9, 1915, by a two-thirds vote sustained Judge Clark's view as to what they really did mean by the use of the word "freeholder" in the statute above referred to.

A. H. ROBBINS.

BOOK REVIEWS

BENDER'S WAR REVENUE LAW.

The book on this subject pertains to the internal revenue act of 1914, regarded by Congress to be called for because of decrease of customs on importations resulting from the existence of the European war.

This "war tax" thus necessitated is conceived to be temporary in its nature and to meet an extraordinary need in an emergency, and this book refers to rulings in applying former such laws as an aid to construction of the present act.

The book may be deemed useful to a quick understanding of the statute by giving the history of such a system of taxation and by the annotation of sections thereof of like import with those in former laws. For example, there is an extensive note on license and occupation taxes, in which their constitutionality is shown, and the kind of construction to be placed on them. Many departmental rulings under former statutes as well as judicial decisions are instanced.

The book appears in excellent type as to sections and the notes thereon, is bound in law buckram, contains index and table of cases and issues from the house of Matthew Bender & Co., Albany, N. Y., 1914.

BOOKS RECEIVED

Modern Legal Philosophy Series: Vol. X. The Formal Bases of Law. By Giorgio Del Vecchio, Professor of Philosophy of Law in the University of Bologna. Translated by John Lisle of the Philadelphia bar. With an editorial preface by Joseph H. Drake, Professor of Law in the University of Michigan. And with introductions by Sir John MacDonnell, Professor of Comparative Law in University College, London, and Shepard Barclay, former Chief Justice of the Supreme Court of Missouri. Price, $4.50. Boston. The Boston Book Company, 1914. Review will follow.

HUMOR OF THE LAW.

An Englishman and a German were dining together the other night. They are friends of long standing, too fond of each other to allow hostilities across the sea to disrupt their friendship. On the contrary they take pleasure in "spoofing" each other about the strained relations between their countries.

The Englishman remarked that he supposed that Germany would fight to the last German. The Teuton answered:

"Yes, and I suppose England will fight to the last Frenchman."—Case and Comment.

An English judge was trying a case where the accused could only understand Irish, and an interpreter was accordingly sworn. Presently the prisoner said something to the interpreter and the latter replied. The judge demanded to know what was said, and although the interpreter declared that it had nothing to do with the case the judge insisted. "My lord," said the interpreter at length, "he said, 'Who's that ould woman sitting up there with a red bed-curtain round her?' And I said, 'Whist, ye spalpeen, that's the ould boy that's going to hang yez!'" Then the judge wished he had not insisted.

Lawyer (to timid young woman)--"Have you ever appeared as witness in a suit before?"

Young Woman (blushing)—"Y—yes, sir; of course."

Lawyer—"Please state to the jury just what suit it was."

Young Woman (with more confidence)—"It was a nun's veiling, shirred down the front and trimmed with a lovely blue, and hat to match—"

Judge (rapping violently)—"Order in the court!"—New York Sun.

A colored man called at Mrs. Baxley's looking for work.

"What is your name?" she asked, after hiring him.

"Mah name is Poe, ma'am," was the answer.

"Poe!" she exclaimed. "Perhaps some of your family worked for Edgar Allan Poe; did they?"

The colored man opened his eyes wide with amazement.

"Why—why, ma'am," he said, as he pointed a dusky finger at himself—"why, ah am Edgah Allan Poe!"—October Lippincott's.

WEEKLY DIGEST.

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Adverse Possession** — Abandonment. — Where defendant ceased cutting timber for 11 years, but in the meantime marked the lines and made a survey, the possession was not abandoned.—Chase v. Eddy, Vt., 92 Atl. 99.

2.——Defined.—Where defendant and his predecessors in title in possession of adjoining land merely marked off the boundary of the land claimed, took a few rails and logs therefrom, but did not have actual possession for the statutory period, such possession could not ripen into a prescriptive title.—Frazier v. Ison, Ky., 170 S. W. 977.

3.——Prescription.—To constitute adverse user essential to an estate by prescription, the possession must be actual, open and notorious, hostile under an exclusive claim of right, and continuous and uninterrupted for five years prior to the commencement of the action.—Howard v. Wright, Nev., 143 Pac. 1184.

4. **Bail**—Jurisdiction.—The Supreme Court, having only appellate jurisdiction, under Const. art. 85, may not bail an accused pending an appeal from the affirmance of a conviction to the Supreme Court of the United States.—State v. Duvall, La., 66 So. 387.

5. **Bankruptcy**—Exemption.—Where a husband before bankruptcy transferred his homestead interest to his wife, the fact that on bankruptcy proceedings he claimed a homestead exemption does not, under Rev. St. 1909, § 8304, prevent the wife from asserting her homestead exemption in the same property.—Morrow v. Zane, Mo., 170 S. W. 918.

6.——Widow's Allowance.—The right of the widow and children of a deceased bankrupt, under Bankr. Act, July 1, 1898, § 8, to the allowance they were entitled to from his estate under state law, was not lost because the estate had vested in the trustee in bankruptcy under section 70 of the Bankruptcy Act before the death of the bankrupt.—Hull v. Dicks, 35 Sup. Ct. Rep. 152.

7. **Banks and Banking**—Indictment.—Indictment, charging cashier of banking and trust company with receiving a deposit, knowing that such institution was insolvent, held insufficient to state an offense under Acts 1911, c. 44; it not alleging that the banking and trust company was a bank, and such company not appearing in any list of corporations published pursuant to Shannon's Code, § 2033.—State v. Willis, Tenn., 170 S. W. 1032.

8.——Police Power.—Validity under the police power of Laws Okl. 1911, c. 31, as amended by Laws 1913, c. 22, under which a bank depositor's guaranty fund is created by an assessment on state banks, is not affected because the state vested the title to the fund in itself, so as to extend to the state banking board the state's immunity from suit.—Lankford v. Platte Iron Works Co., 35 Sup. Ct. Rep. 173.

9. **Bills and Notes**—Intoxication.—In an action on a note executed for a valid debt, the defense that it was executed by defendant while intoxicated was not available, where for five years after knowledge of the transaction he recognized the note as valid.—Matz v. Martinson, Minn., 149 N. W. 370.

10.——Transfer by Bona Fide Holder.—Where a note given to raise money for stock gambling was valid in the hands of the payee, it may be enforced by an accommodation indorser, even though he knew the purpose for which the money was used.—Citizens' Nat. Bank v. MacDonald, Va., 83 S. E. 389.

11. **Boundaries**—Evidence. — Evidence that ordinary land overruns measures given in old deeds and surveys held admissible to explain apparent discrepancies between old surveys and what are claimed to be the monuments marking lines and corners.—Smith v. Booth Bros. & Hurricane Isle Granite Co., Me., 92 Atl. 103.

12. **Carriers of Passengers**—Negligence.—Where one at a railroad station, with which he was familiar, attempted to leave the platform, where it was dark, and where he knew there was no railing, though he could have gone down steps which were lighted by his lantern, or could have taken the lantern with him, he was negligent.—Dunnevent v. Southern Ry. Co., N. C., 83 S. E. 347.

13.——Negligence Per Se.—The act of a brakeman in jerking from the steps an elderly female passenger alighting from a train held negligence per se, rendering the carrier liable for injuries sustained as the proximate result thereof.—Chicago, R. I. & P. Ry. Co. v. Pitchford, Okla., 143 Pac. 1146.

14.——Prima Facie Case.—In an action for the loss and breakage of articles in a passenger's grip, plaintiff's proof that when he delivered the grip to defendant it was in good condition, and when he received it 60 days later some of the contents were gone and some damaged, held sufficient to make out a prima facie case of negligence against the carrier as bailee.—Ross v. St. Louis, I. M. & S. Ry. Co., Mo., 170 S. W. 920.

15.——Regulations.—A railroad has the right to require of persons to purchase the tickets before becoming passengers and to exhibit their tickets and enter the trains at certain doors, provided sufficient facilities are afforded.—St. Louis & S. F. R. Co. v. Dyer, Ark., 170 S. W. 1013.

16. **Commerce**—Excise Tax.—Annual excise tax equal to five-tenths of 1 per cent on gross earnings from transportation originating and terminating within the state, imposed by Tax Law, N. Y., § 184, is not an invalid regulation of commerce as applied to a navigation company engaged in towing on the Hudson river under a license granted by the United States.—People ex rel. Cornell Steamboat Co. v Sohmer, 35 Sup. Ct. Rep. 162.

17.——Federal Regulation.—Absence of federal regulation does not justify the city of Covington, Ky., in regulating interstate business of a street railway company transporting passengers from that city to Cincinnati, Ohio, by restricting the number of passengers which the company may admit to its cars and requiring it to operate sufficient cars to accommodate the public within the limits of such restriction.—South Covington & C. St. R. Co. v. City of Covington, 35 Sup. Ct. Rep. 158.

18.——Telegraph Companies.—Act of Congress of June 18, 1910, which made telegraph companies subject to federal rules and regulations, held to supersede state statutes in so far as they impose penalties for delay in the transmission of interstate messages.—Western Union Telegraph Co. v. First Nat. Bank of Berryville, Va., 83 S. E. 424.

19. **Constitutional Law**—Automobiles. — A resident of the District of Columbia, failing to show compliance with the laws of the District as to registering automobiles and licensing operators, or that he has applied for local identi-

fying tags, required by Laws Md. 1910, c. 207, § 140a, to a limited use of the highways by nonresidents, cannot complain that residents of the District are not among those to whom this privilege is granted.—Hendrick v. State of Maryland, 35 Sup. Ct. Rep. 140.

20.——Rates.—A carrier cannot object on constitutional grounds to procedure under Ky. St. § 829, to recover payments in excess of rates fund by State Railroad Commission to be reasonable, because it cannot produce evidence other than that presented to the Commission at a trial in the court, unless the court is satisfied that the evidence could not have been produced before the Commission with reasonable diligence, where no defense is shown that the carrier has not either interposed or waived before the Commission.—Louisville & N. R. Co. v. Finn, 35 Sup. Ct. Rep. 146.

21.——Unlawful Discrimination.—An employer cannot object to discrimination, so far as it affects employes, which the Ohio Workmen's Compensation Act makes between employes in shops with five or more employes and those in shops having a lesser number.—Jeffrey Mfg. Co. v. Blagg, 35 Sup. Ct. Rep. 167.

22.——Workmen's Compensation Law.—Employers having five or more employes are not denied equal protection of the laws, because their failure to comply with Ohio Workmen's Compensation Act (Page & A. Gen. Code, § 1465-37 et seq.), by payments into a state insurance fund, deprives them in negligence suits of defenses of contributory negligence, assumed risk, and negligence of fellow servants, while those employing four or less employes can make either of these defenses.—Jeffrey Mfg. Co. v. Blagg, 35 Sup. Ct. Rep. 167.

23. **Contracts**—Action.—Where a promise is made to the promisee, on a consideration moving from him, and no particular fund or means of payment is placed in the hands of the promisor out of which payment is to be made, the right of action on the promise is in the promisee alone.—First Methodist Episcopal Church v. Isenberg, Pa. 92 Atl. 141.

24.——Architects.—That architects employed to prepare plans for an addition to a sanitarium discontinued work after being advised that the sanitarium company had concluded not to construct the addition did not preclude the architects from recovering damages for breach of the contract.—Ferneskes v. Nugent Sanitarium, Wis., 149 N. W. 393.

25.——Pari Delicto.—Parties to an illegal contract are not regarded as equally guilty, where one has been induced into the contract through the fraud or oppression of the other, in which case equity will relieve against the fraud, etc., whenever the public good requires it.—Gilchrist v. Hatch, Ind., 106 N. E. 694.

26. **Corporations**—Process.—Where return of process against a corporation showed service by delivering a copy to S, but there was nothing showing his connection with the defendant, the service was void.—Supreme Ruling of Fraternal Mystic Circle v. Sommers, Miss., 66 So. 322.

27.——Receivership.—Where a majority of the stockholders and directors permit the president of the corporation to handle its funds in an unauthorized manner, without keeping an intelligent account, a receiver may be appointed.—In re Receivership of Leidigh-Dalton Lumber Co., La., 66 So. 390.

28.——Stock Subscription.—In order to make out a bona fide stock subscription, it is not necessary that there be a present payment in cash or a solvent subscriber; but it is sufficient if the subscription is in good faith, with a reasonable expectation of being able to pay assessments as called.—Boushall v. Myatt, N. C., 83 S. E. 352.

29. **Criminal Law**—Change of Venue.—Where defendant was charged with the murder of a fellow miner, and had been pursued by a mob which threatened to kill him and there was a strong prejudice in the camp against his race, and the newspapers had published false articles, he was entitled to a change of venue.—Jabich v. People, Colo., 143 Pac. 1092.

30.——Jury.—Where three bottles of beer, in evidence in a prosecution for maintaining a liquor nuisance, were taken by the jury into their room and were found empty when the jury returned with their verdict, it required that a judgment of conviction be reversed.—State v. Applegate N. D., 140 N. W. 356.

31.——Separation of Jurors—To take the jurors to a hotel and lodge them in six separate rooms, the deputy sheriff sleeping in the hall, held not a compliance with the requirement that jurors in a capital case must not be separated.—State v. Walters, La., 66 So. 364.

32. **Death**—Absence.—In order for an absence to create a presumption of death, it must be such that the life of a man, who may live 100 years, should be presumed to have ended.—Quaker Realty Co. v. Starkey, La., 66 So. 386.

33.——Special Verdict.—A special verdict, stating that defendant's negligence was "a" proximate cause of the death of plaintiff's decedent, instead of "the" proximate cause, was not fatally defective, where the evidence conclusively showed that such negligence was the proximate cause.—Mahegan v. Faber, Wis., 149 N. W. 397.

34. **Dedication**—Map.—Where the owners sold lots by reference to a map which showed them as extending to the bluff, though more accurate survey showed that, with the lots the same size as the adjoining lots, a strip would be left between them and the bluff, such strip was not dedicated to the public.—Chase v. Oregon City, Ore., 143 Pac. 1111.

35. **Deeds**—Burden of Proof.—Where a father deeded all his property to the exclusion of the other children, to the son who lived with and cared for him, and it appeared that the father was old and infirm, the son has the burden of rebutting the presumption of undue influence.—Gross v. Courtley, Ky., 170 S. W. 600.

36.——Grantees.—Where land is conveyed to two persons, it will be presumed that they took equally, which presumption will be given effect, in the absence of clear and convincing proof of a contract to the contrary, definite in its terms, and so far executed that not to decree full performance would be a fraud.—Smith v. Alderson, Va., 83 S. E. 373.

37. **Divorce**—Desertion.—That a wife refused to live with her husband at the home of his parents, though, willing to live with him under any other reasonable conditions, was not desertion sufficient to justify a divorce.—Marshak v. Marshak, Ark., 170 S. W. 567.

38.——Res Judicata.—Judgment in divorce awarding the wife personal property as a part of her permanent alimony, and pendency of appeal therefrom to the Supreme Court, held not to bar replevin by her to recover from the husband property included in that so awarded on the ground that it belonged to her.—Aylor v. Aylor, Mo., 170 S. W. 704.

39. **Domicile**—Acquisition of.—One removing his family from Michigan to Connecticut on the death of a relative in the latter state, and residing there until his death in a house to which he holds title, held to have acquired a domicile in Connecticut, so far as a federal court jurisdiction is concerned.—Gilbert v. David, 35 Sup. Ct. Rep. 164.

40. **Easements**—Adverse User. — Where a landowner opens and keeps a road across his land for his own use, the fact that an adjoining owner makes use of the road under circumstances not interfering with the former's use, creates no presumption that the latter use is adverse.—Howard v. Wright, Nev., 143 Pac. 1184.

41.——Private Way.—Where owners of adjoining lots orally agreed upon a private way between their lots and constructed their improvements with relation thereto, each was estopped from disputing the other's right to such way.—Forde v. Libby, Wyo., 143 Pac. 1190.

42. **Estoppel**—Contradictory Testimony. — Contradictory statements by wife, on trial of divorce case, as to ownership of property, though proper for consideration as affecting her credibility in a subsequent action of replevin by her, held not to prevent her from maintaining such replevin action.—Aylor v. Aylor, Mo., 170 S. W. 704.

43. **Executors and Administrators**—Insolvency.—Where the estate was insolvent, held error to overrule a protest against appointment as executrix of a woman sustaining meretricious relations with testator after separation

from his wife, under Rev. St. 1908, § 7111.—Deeble v. Alerton, Colo., 143 Pac. 1096.

44. **Guardian and Ward**—Attorney and Client.—Where a tutrix, without the advice of a family meeting, employs an attorney on a contingent fee exceeding the ward's revenue, the ward may be held liable within certain limits for the benefits received, though the employment contract is unauthorized.—Succession of Hanna, La., 66 So. 355.

45. **Homicide**—Dying Declaration. — Where decedent was stabbed, the knife pierting the pulmonary artery, and he got up, staggered against a fence, and fell into the arms of a friend, to whom he stated that defendant had killed him, and died almost at once, the declaration was made under a sense of impending death.—People v. Vukojevich, Cal., 143 Pac. 1058.

46.——Evidence.—Where it was the theory of the state that deceased, when he saw accused, got behind B to shield himself, and the theory of the defense was that deceased placed B in front of him and then attacked him, whether B would have run away if he had been stronger than deceased is inadmissible.—Echols v. State, Tex., 170 S. W. 786.

47.——Evidence. — Where commonwealth claimed killing was done with guns and cartridges taken from city jail, evidence as to where the guns and cartridges were kept, and that accused had free access to them, and that he was treated as a trusty, held competent.—Haywood v. Commonwealth, Ky., 170 S. W. 624.

48.——Justifiable.—A killing by defendant under belief that deceased was immediately about to execute his threats to kill defendant, or that he was intending to inflict death or great bodily harm upon defendant, held justifiable homicide.—Harper v. State, Tex., 170 S. W. 721.

49.——Principal.—Where one person unites with others to commit a felony or misdemeanor, intending to withstand all opposition by force, and is present aiding and abetting in a murder committed by one of the party pursuant to the original design, he is guilty as a principal offender.—People v. Ford, Cal., 143 Pac. 1075.

50.——Self-Defense. — A defendant, who armed himself after hearing that deceased had threatened his life and was looking for him, would lose his right to self-defense if he sought the deceased for the purpose of killing him.—Quinn v. State, Tex., 170 S. W. 783.

51. **Hospitals**—Vacancy in Office.—Under Revisal 1905, § 4547, a director of the state hospital, appointed by the governor while the senate was not in session, to fill a vacancy, held office only until his successor was appointed by the concurrent action of the governor and the senate.—Salisbury v. Board of Directors of the State Hospital at Raleigh, N. C., 83 S. E. 354.

52. **Husband and Wife**—Antenuptial Contract.—An agreement between parties about to be married that the wife shall live with her husband at the home of his parents held an antenuptial contract merged in the marriage contract and of no binding force.—Marshak v. Marshak, Ark., 170 S. W. 567.

53.——Gift.—A gift from a husband to his wife of personal property, purchased by him for her, is completed when a delivery is made at the home jointly occupied by them in accordance with his intention that it be her property thereafter.—Aylor v. Aylor, Mo., 170 S. W. 704.

54.——Homestead.—Where a husband has designated a homestead of 200 acres out of a larger tract, he may mortgage or convey the excess, and such conveyance passes the title, though the wife does not join therein.—Hughes v. Hughes, Tex., 170 S. W. 847.

55. **Indians**—Evidence.—As used in Act Cong. May 27, 1908, § 3, the term "approved rolls" was intended to be conclusive evidence of the quantum of Indian blood, and the "enrollment records" were intended to be conclusive evidence of the age of those enrolled.—Campbell v. McSpadden, Okla., 143 Pac. 1138.

56.——Necessary Parties.—Where an Indian allottee, after mortgaging his allotment, conveyed same by warranty deed, he was not a necessary party to proceedings to foreclose the mortgage, when no personal judgment was prayed against him.—Freeman v. First National Bank of Boynton, Okla., 143 Pac. 1165.

57. **Insurance**—Conditions Subsequent.—In an action for the breach of a contract giving an exclusive fraternal insurance agency, with the right to terminate if plaintiff's management was not satisfactory, held that the conditions as to his work, reports, etc., were conditions subsequent, breach of which the agent need not negative, that being a matter of defense.—Hall v. International Liberty Union of the World, Ky., 170 S. W. 631.

58.——Iron Safe Clause.—Provisions in fire policies, requiring the taking of an inventory, the keeping of regular books, and their preservation in an iron safe, are promissory warranties which must be strictly performed to entitle the insured to recover.—Hartford Fire Ins. Co. v. Farris, Va., 83 S. E. 377.

59.——Waiver.—Where defective proofs of loss are delivered to the insurer, within time stipulated, in good faith as a compliance with the policy, and the insurer fails to give immediate notice of its objections, pointing out the defects, it waives them.—Wakely v. Sun Ins. Office of London, Eng., Pa., 92 Atl. 136.

60. **Intoxicating Liquors**—Interstate Commerce.—Under Allison Act, § 5, prohibiting the delivery of interstate shipments of intoxicants in prohibition territory when intended to be used contrary to law, the carrier is bound to use proper care to see that the liquors are not intended to be so used.—Ex parte Peede, Tex., 170 S. W. 749.

61. **Joint Tenancy**—Inurement of Title.—A joint tenant's purchase of an outstanding title or incumbrance will inure to the benefit of his cotenants, if, within a reasonable time, they contribute their ratable share of their expense of acquiring it.—Spurlock v. Spurlock, Ky., 170 S. W. 605.

62. **Landord and Tenant**—Surrender of Premises.—Any act amounting to an agreement by a tenant to abandon and on the part of the landord to resume possession of demised premises amounts to a surrender by operation of law.—G. M. Mining Co. v. Hodge, Mo., 170 S. W. 689.

63. **Larceny**—"Taking."—Selling goods of another without taking possession of them is not sufficient "taking" to constitute larceny, but where the buyer, in good faith, takes possession and removes the property, the seller is guilty of larceny.—Smith v. State, Ga., 83 S. E. 437.

64. **Libel and Slander**—Privilege.—Statements made in a church convention during a campaign for state-wide prohibition against a minister of the church who was opposed to a constitutional amendment for that purpose are qualifiedly privileged, and actual malice must be shown.—Dickson v. Lights, Tex., 170 S. W. 834

65.——Privilege.—Plaintiff, in an action for libel against a physician for publishing his name in a confidential list, for the local medical association, of patients who were slow pay, held not entitled to recover, in the absence of any showing of malice.—McDonald v. Lee, Pa., 92 Atl. 135.

66.——Want of Chastity.—An information charging that defendant falsely, maliciously, and wantonly imputed a want of chastity to a married woman, naming her, in the presence of certain persons, by saying that her husband was not the father of her child, sufficiently imputed a want of chastity, without innuendo.—Hatcher v. State, Tex., 170 S. W. 725.

67. **Malicious Prosecution**—Advice of Attorney.—Where lunacy inquistion was without justification, an instruction that the jury might consider advice of an attorney to defendants as bearing on their good faith, held to accord them all the benefit to which such proof entitled them.—Manz v. Kippel, Wis., 149 N. W. 375.

68. **Mandamus**—Justice of the Peace.—Where magistrate admitted that affidavit was sufficient to require issuance of warrant, if act charged violated a valid ordinance, but denied the warrant on the erroneous ground that the ordinance had been repealed, mandamus lies to compel the issuance of the warrant.—Marshall v. Herndon, Ky., 170 S. W. 623.

69.——Remedy.—Mandamus is the proper remedy to compel a railroad company to perform its duty to restore steps on a public footpath crossing its tracks, and to maintain a

flagman at that point, as directed by the city council.—Norfolk & W. Ry. Co. v. City of Bristol, Va., 83 S. E. 421.

70. **Master and Servant**—Assumption of Risk.—Where a yard switchman of experience, desiring to couple an engine to a car, endeavored to push the engine drawbar over with his foot so as to make the coupling, and was injured in so doing, he assumed the risk.—Wiley v. Cincinnati, N. O. & T. P. Ry. Co., Ky., 170 S. W. 652.

71.——Contributory Negligence. — Where plaintiff, pushing a meat truck through a door with his hand on the sides of the truck bin, was injured by the truck striking the doorjamb by reason of a defect in the floor of which he had knowledge, he was guilty of contributory negligence as a matter of law in not pushing the truck from the rear.—Rogers v. Tegarden Packing Co., Mo., 170 S. W. 675.

72.——Negligence Per Se.—In an action by a tracklayer in a mine for injuries sustained by a car being pushed upon him by a train after he had pushed it back to a point where it did not clear the main track in an entry, plaintiff held negligent as a matter of law.—Jellico Coal Mining Co. v. Gothard, Ky., 170 S. W. 649.

73. **Militia**—Enlistment.—Enlistment is a contract and the Legislature cannot, by repeal of a statute under which a militiaman enlisted, impose upon him more onerous conditions and obligations than those to which he gave his consent.—State ex rel. Lanng v. Long, La., 66 So. 377.

74. **Mines and Minerals**—Estoppel.—Where the lessor did not know of a practice of the lessee to appropriate such coal as would pass through a five-eighths-inch mesh, without paying for same, neither the lessor nor his successor in interest was estopped, by acceptance of payment for such coal as passed over such mesh, to claim royalties for the smaller sizes of coal.—Girard Trust Co. of Philadelphia v. Delaware & H. Co., Pa., 92 Atl. 129.

75.——Fruits and Products.—The right of a possessor in good faith under Rev. Civ. Code, arts. 502, 3453, to the fruits and products of land until it is claimed by the owner does not permit him to extract the mineral, oil, and gas therefrom; minerals not being included in the words "fruits" and "products" which are here used as synonymous.—Elder v. Ellerbe, La., 66 So. 337.

76. **Monopolies**—Labor Organizations.—Reasons given by customers for refusing to deal with sellers of plaintiff's hats, including letters from dealers, were admissible in an action under Sherman Anti-Trust Act, Juy 2, 1890, against members of labor organizations to recover damages to interstate trade by a combination through the use of the boycott.—Lawlor v. Loewe, 35 Sup. Ct. Rep. 170.

77. **Municipal Corporations**—Contracts. — A municipal corporation incurs no obligation as to costs and attorney's fees in a suit by the state to forfeit the charter of a private corporation and withdraw its franchise, though, as a result, the municipal corporation obtains without expense a privilege for which otherwise it would have to pay heavily.—Forman v. Sewerage and Water Board of New Orleans, La., 66 So. 351.

78.——Public Improvement.—To relieve a contractor from his contract for a public improvement, and to hold the city liable for the work done, because it determined the work was dangerous to adjoining property, it must be shown that it was impossible to do the work in any other manner.—Carruthers v. City of Astoria, Ore., 143 Pac. 1106.

79.——Street Improvement.—A lien for a street improvement cannot be questioned on the ground that the improvement did not comply with the contract where performance was accepted without fraud or mistake.—Town of Russell v. Whitt, Ky., 170 S. W. 609.

80. **Negligence**—Imputable.—Where a person riding in a vehicle driven by another has entire control over the vehicle and driver, the driver's negligence is imputable to him in his action for injuries from collision with a street car.—Bofill v. New Orleans Ry. & Light Co., La., 66 So. 339.

81. **Nuisance**—Evidence.—In an action for damages for the annoyance caused by the unnecessary blowing of whistles and letting off of steam by defendant's engines, a letter or bulletin issued by its superintendent, reciting complaints in those respects and requiring that such noises be stopped, held inadmissible.—Kelly v. Erie R. Co., N. J., 92 Atl. 89.

82. **Partnership**—Good Will.—One who purchased a one-third interest in the business of an insurance solicitor, which consisted principally in the representation of an insurance agency with which the solicitor had a contract, was not entitled, on dissolution, to recover any amount for the good will of the business.—Hirschberg v. Bacher, Wis., 149 N. W. 383.

83. **Partition**—Confirmation.—On dismissing, for want of prosecution, an intervening petition, in a suit for partition, praying that the sale be not confirmed, it was improper to confirm the sale and adjudicate petitioner's rights in the property; she not having been a party.—Talley v. Talley, Miss., 66 So. 328.

84. **Perjury**—Grand Jury.—Under White's Ann. Code Cr. Proc. art. 427, an indictment charging perjury before the grand jury, which alleged that the oath was administered by one L. under the direction of the foreman, is sufficient, though not alleging the facts showing L's authority.—Ecoff v. State, Tex., 170 S. W. 707.

85. **Postoffice**—Mail.—Letters of telegraph superintendent, written to a station agent and telegraph operator, held within exceptions of Penal Code, § 184, prohibiting the carriage of letters otherwise than in the mails, except such as relate to freight or the current business of the carrier.—United States v. Erie R. Co., 35 Sup. Ct. Rep. 193.

86. **Principal and Agent**—Disclosure of Principal.—An agent contracting in his own name, without disclosing his principal, renders himself personally liable, unless it affirmatively appears that it was the mutual intention that he should not be bound.—Frank v. Woodcock, Ore., 143 Pac. 1105.

87.——Estoppel.—Where plaintiff's agent accepted defendant's check in settlement for certain staves, in an amount less than claimed, and plaintiff knowingly received and retained the check, he could not deny that his agent had authority to accept it as an accord and satisfaction.—Pekin Cooperage Co v. Gibbs, Ark., 170 S. W. 574.

88. **Railroads**—Damages.—Where a deed conveyed to defendant railroad company sufficient land for a single track railroad and 15 feet on each side for ditches, the railroad company had no right to use such 15 feet for an additional track, and, having done so, was liable for the resulting damages.—Chesapeake & O. Ry. Co. v. Blankenship, Ky., 170 S. W. 620.

89.——Destruction of Property.—The mere presence of cotton on right of way without the company's affirmative permission does not relieve it from liability for destruction by a fire caused by its negligence.—Texas & P. Ry. Co. v. Rosborough, 35 Sup. Ct. Rep. 117.

90.——Evidence.—Testimony that, a few days after a fire alleged to have been set by a locomotive, witness saw engines emit cinders while passing, held admissible.—Texas & P. Ry. Co. v. Rosborough, 35 Sup. Ct. Rep. 117.

91.——Evidence.—In an action for damages to an automobile, due to a defective railroad crossing, evidence that there was another safe crossing by which plaintiff could have crossed the tracks without inconvenient interruption to his journey was improperly excluded.—Ft. Smith & W. R. Co. v. Seran, Okla., 143 Pac. 1141.

92.——Footpath.—A public footpath across a railroad track at its intersection with a city street is subject to regulation and control by the city council regardless whether it was part of the highway as originally dedicated, or had become a public way by prescription.—Norfolk & W. Ry. Co. v. City of Bristol, Va., 83 S. E. 421.

93.——Negligence.—It is an actionable negligence for a railroad company to allow combustible materials to accumulate near the tracks that will be likely to take fire from sparks necessarily emitted by engines, and, as a natural and probable result, ignite and damage property of another.—Carolina, C. & O. Ry. Co. v. Unaka Springs Lumber Co., Tenn., 170 S. W. 591.

94. **Reformation of Instruments**—Mistake.—A mistake in the writing given by defendant

to plaintiff bank, by omitting the words "as indorsers" after the word "bound," could not be reformed for mistake on the part of the signers, where the bank was not a party to the mistake, and had obtained credit by reason of it, and it had induced the bank examiner to pass the bank.—Doherty v. First Nat. Bank of Louisville, Ky., 170 S. W. 615.

95. **Sales**—Conditional Sale.—A buyer of personal property under a conditional sale contract is the equitable owner, and its destruction by fire while in the buyer's possession does not relieve him from the obligation to pay the price.—Carolina, C. & O. Ry. Co. v. Unaka Springs Lumber Co., Tenn., 170 S. W. 591.

96. **Specific Performance**—Defect in Title.—Where a vendor's title is defective or his interest different from that he agreed to convey, the purchaser may compel the conveyance of such title or interest as the vendor has with an allowance for the defect.—Flowe v. Hartwick, N. C., 83 S. E. 841.

97. **States**—Boundary Line.—The disputed part of the boundary line between North Carolina and Tennessee, as located by commissions appointed in 1821, and established by each state, follows the Slick Rock Creek and the Fodderstack ridge, rather than the Hangover ridge, and then follows the main ridge of the Unaka Mountains southwesterly, crossing the Tellico river.—State of North Carolina v. State of Tennessee, 35 Sup. Ct. Rep. 8.

98.——Suit Against.—The title of the state to the bank depositor's guaranty fund created under Laws Okl. 1911, c. 31, as amended by Laws 1913, c. 22, and the interest which the state has that such fund be administered by the state banking board, are such that a suit by a depositor to compel the board to pay the deposit of the fund is a suit against the state, which under Const. U. S. Amend. 11, cannot be maintained without the state's consent.—Lankford v. Platte Iron Works Co., 35 Sup. Ct. Rep. 173.

99. **Street Railroads** — Avoiding Injury. — Where the officer, in charge of a patrol wagon driven upon an electric railway track on which was approaching a car that the driver saw, was injured from a collision with the car, notwithstanding the motorman's efforts to avert the collision, the railway company was not liable. —Bofill v. New Orleans Ry. & Light Co., La., 66 So. 339.

100.——Negligence.—Where the driver of a wagon, before crossing a street railway track, saw a car approaching but misjudged its distance or its speed, and the accident was not caused by negligence of the railway company or its motorman, the company is not liable.—Gregoire v. Portland Ry., Light & Power Co., Ore., 143 Pac. 1103.

101. **Subrogation**—Joint Tenants. — Where land is conveyed to two persons jointly, reserving a lien to the grantor for the unpaid portion of the price, and one of the grantees pays more than his share, he will be subrogated to the grantor's lien for the difference, as against his co-owner.—Smith v. Alderson, Va., 83 S. E. 373.

102. **Sunday**—Contracts.—A contract for services of vaudeville performers is not void as in violation of Pen. Code 1911, art. 302, where the contract called for no services upon Sunday except such as might be lawfully given.—Bergere v. Parker, Tex., 170 S. W. 808.

103. **Telegraphs and Telephones**—Mental Anguish.—In an action for delay in the delivery of a message announcing the death of plaintiff's nephew, whereby plaintiff was prevented from attending the funeral, a charge that mental anguish is presumed from close blood relationship was proper.—Hedrick v. Western Union Telegraph Co., N. C., 83 S. E. 358.

104. **Theaters and Shows** — Disturbance.—Where a policeman summoned to quiet a disturber finds him complaining loudly and demands that he be quiet or leave the theater and thereupon the disturber walks out, the proprietor of the theater is not liable in damages for humiliation or injury to the disturber's reputation.—Russo v. Orpheum Theatre & Realty Co., La., 66 So. 385.

105. **Tenancy in Common**—Tax Title.—Since the principle that a co-owner who acquires a tax title holds for his co-owners is founded on equitable consideration, any right claimed thereunder is lost unless exercised within a reasonable time.—Vestal v. Producers' Oil Co., La., 66 So. 334.

106. **Trade-marks and Trade-names**—Unfair Competition.—A later competitor whose use of his own name on his goods will lead the public to understand the goods are the product of an established firm known under that name must take reasonable precautions to prevent mistake.—L. E. Waterman Co. v. Modern Pen Co., 35 Sup. Ct. Rep. 91.

107. **Trespass**—Evidence.—In an action to recover for granite taken which had been vested in plaintiff's intestate and other parties in common, a deed vesting title in the intestate to the land upon which the granite was, and also, as claimed, covering other land lying between such tract and the land of defendant, held properly admitted.—Smith v. Booth Bros. & Hurricane Isle Granite Co., Me., 92 Atl. 103.

108. **Trusts**—Commissions.—Trustees who invest trust funds in notes owned by a firm of real estate brokers in which one trustee is a partner, paying full face value, must account for commissions received by the firm from the makers of the notes when the loans were made which the notes represented.—Magruder v. Drury, 35 Sup. Ct. Rep. 77.

109.——Income.—Where a loan was made to beneficiary to supply him with necessaries before will creating the trust had been found, on his mortgage of his supposed interest in the estate, held that equity could direct the application of the income to the repayment of the loan.—Managan v. Shea, Wis., 149 N. W. 378.

110. **United States**—Waiver. — Waiver of quartermaster-general of the United States army in his discretion of the time limit in a contract for construction of a vessel carries with it a release of any claim by the government for liquidated damages under the contract for such delay after the waiver.—Maryland Steel Co. of Baltimore County v. United States, 35 Sup. Ct. Rep. 190.

111. **Usury**—Specific Performance.—An option entitling plaintiff to purchase about 300 acres of defendant's land, worth from $8,000 to $9,000, for $3,600, held part of a usurious and unconscionable bargain by which defendant obtained a loan from complainant of $1,100, and hence would not be specifically enforced in equity.—Carter v. Hook, Va., 83 S. E. 386.

112. **Waters and Water Courses**—Appropriation.—The amount of the prior appropriation of a company which had completed its works prior to the irrigation statute (Laws 1889, c. 68) was limited to the capacity of its works and dependent on its diverting and applying the water within a reasonable time.—In re Kearney Water & Electric Powers Co., Neb., 149 N. W. 363.

113.——Obstructions.—An owner may erect and maintain buildings or other structures on piles driven into the bed of the stream, provided he does not dam up the river or interfere with the flow of upper proprietors, or erect the buildings so that they will be washed away. —Carleton v. Cleveland, Me., 92 Atl. 110.

114. **Wills**—Jurisdiction.—Under Code 1904, § 2535, providing that any court, on being informed that a person has a testator's will, may compel him to produce it, the circuit court had no jurisdiction to compel the beneficiary's attorney to deliver up a will for safe-keeping, where no one was asking that this be done, or seeking its probate.—In re Nicholas' Will, Va., 83 S. E. 368.

115.——Remainder.—Under will giving residuary estate to wife for life, with remainder to children, and providing that the wife should manage the estate, and might sell or incumber it with the consent of the majority of the children, held that a child took a vested remainder. —Ward v. Caples, Tex., 170 S. W. 816.

116. **Witnesses**—Competency. — An eight-year-old infant, who, on her preliminary examination, stated that she understood, when she took the oath, that if she told an untruth she would be punished and would "go to the bad place," was a competent witness.—Adkins v. Commonwealth, Ky., 170 S. W. 607.